JOSEPH F. SPANIOL, JR.
CLERK
Supreme Court, U.S.
FILED
FEB 28 1989

(6) (6)

Nos. 88-5014 and 88-5158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, *Petitioner,*

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

JOINT BRIEF FOR PETITIONERS

JOEL B. RUDIN*
Mass & Rudin
Attorneys for Petitioner Jose Gomez
45 Rockefeller Plaza, Suite 730
New York, New York 10111
(212) 969-9200

JERALD LEVINE
Attorney for Petitioner
Diego Chavez-Tesina
73-19 Broadway
Jackson Heights, New York 11372
(718) 507-6464

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, permits a district court, over a defendant's objection, to delegate jury selection to a federal magistrate in a felony trial.

2. Whether a district court's delegation of jury selection in a felony trial over the defendant's objection violates Article III or the Due Process Clause of the Constitution.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT	11
I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A DISTRICT JUDGE TO DELEGATE JURY SELECTION TO A MAGISTRATE IN A FELONY TRIAL WITHOUT THE DEFENDANT'S CONSENT	11
A. The Evolution And Present Structure Of The Act	11
B. Delegation Of Felony Jury Selection Is Inconsistent With The Entire Statutory Scheme Enacted By Congress In The Federal Magistrates Act	12
1. The Statute Specifically Excludes Magistrates From Conducting Felony Trials, As To Which Congress Understood Jury Selection To Be An Integral Part	12
2. The Legislative History Shows That Congress Intended 'Additional Duties' To Include Routine, Non-Adjudicative Tasks, Not Jury Selection	19
3. Congress' Failure In 1976 To Override The Existing Practice That District Judges Preside At Jury Selection Confirms That The Act Does Not Permit Delegation Of Jury Selection To Magistrates	22
C. Delegation Of Jury Selection Over A Defendant's Objection Is 'Inconsistent' With Fed. R. Crim. P. 24(a) And The Jury Selection And Service Act, Which Require The 'Court' To Preside Over Jury Selection	25
D. The Statute Should Be Construed To Avoid Serious Constitutional Doubts	27
E. Because The Jury That Convicted Petitioners Was Selected By A Magistrate Who Had No Statutory Authority To Do So, The Convictions Must Be Reversed	28

Table of Contents Continued

	Page
II. ART. III DOES NOT PERMIT A MAGISTRATE TO CONDUCT JURY SELECTION IN A FELONY TRIAL OVER THE DEFENDANT'S OBJECTION	30
A. Petitioners Had A Personal Right Under Art. III Of The Constitution To The Presence Of The District Judge During The Jury Selection Phase Of The Trial	30
1. The Right To 'Trial By Jury' Under Art. III And The Sixth Amendment Includes A Right To Trial Before An Art. III Judge	30
2. The Trial Court's Role During Jury Selection Is So Crucial That No Distinction Under Art. III Can Be Drawn Between Jury Selection And The Evidence Phase Of The Trial	35
3. The Criminal Defendant's Compelling Interest In Jury Selection By An Art. III Judge Far Outweighs Congress' Minimal Interest In Authorizing Assignment Of This Function To Magistrates	40
B. Delegation Of Felony Jury Selection Violates Art. III Because The Magistrate's Decision-making Is Essentially Unreviewable, Regardless Of The District Court's Offer Of *'De Novo'* Review	42
C. The Denial Of Petitioners' Art. III Right To The Presence Of A District Judge During Jury Selection Requires That The Judgment Be Vacated	45
III. ASSIGNMENT OF JURY SELECTION TO A MAGISTRATE OVER A FELONY DEFENDANT'S OBJECTION VIOLATES THE DUE PROCESS CLAUSE REGARDLESS OF THE COURT'S OFFER TO REVIEW *'DE NOVO'* THE MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE	46
CONCLUSION	50

TABLE OF AUTHORITIES

Cases — Page

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 47, 49
Aldridge v. *United States*, 283 U.S. 308 (1931) 36
Banks v. *United States*, 614 F.2d 95 (6th Cir. 1980) 16, 22, 29
Batson v. *Kentucky*, 476 U.S. 79 (1986) 9, 34-35, 37-38, 40, 45, 49
Boykin v. *Alabama*, 395 U.S. 238 (1969) 32
Bright v. *State*, 306 S.W.2d 899 (Tex. Crim. App. 1957) . 46
Capital Traction Co. v. *Hof*, 174 U.S. 1 (1899) 15, 34
Carter v. *State*, 512 So.2d 284 (Fla. Dist. Ct. App. 1987) 46
Cary v. *Curtis*, 44 US (3 How.) 236 (1845) 28
Chandler v. *Judicial Council*, 398 U.S. 74 (1970) 31
Chapman v. *California*, 386 U.S. 18 (1967) 29, 45
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 7, 8, 24, 27, 30-33
Connors v. *United States*, 158 U.S. 408 (1895) 26, 36
Crist v. *Bretz*, 437 U.S. 28 (1978) 36
Crowell v. *Benson*, 285 U.S. 22 (1932) 18, 27, 32, 34, 41
Diaz v. *United States*, 223 U.S. 442 (1912) 15
Downum v. *United States*, 372 U.S. 734 (1963) 15-16, 36
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 32
Frank v. *Mangum*, 237 U.S. 309 (1915) 15
Fuentes v. *Shevin*, 407 U.S. 67 (1972) 18
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 30
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 (1931) 26
Gray v. *Mississippi*, 481 U.S. 648 (1987) 35, 45
Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 13
Haith v. *United States*, 231 F. Supp. 495 (E.D. Pa. 1964), *aff'd*, 342 F.2d 158 (3d Cir. 1965) 23
Hall v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987) .. 16, 17, 21, 29
Hall v. *State*, 497 N.E.2d 916 (Ind. 1986) 46
Ham v. *South Carolina*, 409 U.S. 524 (1973) ... 15, 36-37, 45
Hastings v. *Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985) 31
Holy Trinity Church v. *United States*, 143 U.S. 457 (1892) 13
In re Wickline, 796 F.2d 1055 (8th Cir. 1986) 16
Ingram v. *Richardson*, 471 F.2d 1268 (6th Cir. 1972) ... 20
Irvin v. *Dowd*, 366 U.S. 717 (1961) 34, 36-37

Table of Authorities Continued

Page

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 47
Lorillard v. *Pons*, 434 U.S. 575 (1978) 15
Machinists v. *Street*, 367 U.S. 740 (1961) 27
Marion v. *United States*, 404 U.S. 307 (1971) 25
Marshall v. *Jerrico*, 446 U.S. 238 (1980) 35
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) ... 13
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 10, 47
Mathews v. *Weber*, 423 U.S. 261 (1976) 11, 43
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) ... 37
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 30
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 9, 30-33, 41-43, 45
Pacemaker Diagnostic Clinic of America v. *Instromedix*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984) 30-31, 40
Palmore v. *United States*, 411 U.S. 389 (1973) 41
Patton v. *Yount*, 467 U.S. 1025 (1984) 36-37, 44
Peri v. *State*, 426 So.2d 1021 (Fla. Dist. Ct. App. 1983) . 46
Peters v. *Kiff*, 407 U.S. 493 (1972) 46
Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 13
Press-Enterprise Co. v. *Superior Court*, 464 U.S. 501 (1984) 33, 35-37
Remmer v. *United States*, 350 U.S. 377 (1956) 39
Richards v. *United States*, 369 U.S. 1 (1962) 12-13
Richmond Newspapers Inc. v. *Virginia*, 448 U.S. 555 (1980) 40
Rideau v. *Louisiana*, 373 U.S. 723 (1963) 37
Ristaino v. *Ross*, 424 U.S. 589 (1976) 15, 17
Rodriguez v. *United States*, 480 U.S. 522 (1987) 15
Rosales-Lopez v. *United States*, 451 U.S. 182 (1981) ... 35-37
Rose v. *Clark*, 478 U.S. 570 (1986) 45
Russello v. *United States*, 464 U.S. 16 (1983) 22
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 37
Smith v. *Phillips*, 455 U.S. 209 (1982) 39, 46
State v. *Bolton*, 324 Ill. 322, 155 N.E. 310 (1927) 46

Table of Authorities Continued

Page

Stirone v. *United States*, 341 F.2d 253 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965) 23
Swain v. *Alabama*, 380 U.S. 202 (1965)..... 15
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 46
Thompson v. *Lynaugh*, 821 F.2d 1054 (5th Cir.), *cert.* 36 *denied*, ___ U.S. ___, 108 S.Ct. 5 (1987) .....
T.P.O., Inc. v. *McMillen*, 460 F.2d 348 (7th Cir. 1972) 11, 20, 28
Tumey v. *Ohio*, 273 U.S. 510 (1927) 45
United States v. *AAA Electrical Co.*, 788 F.2d 242 (4th Cir. 1986) 36
United States v. *Allen*, 814 F.2d 977 (4th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 371 (1988) 38
United States v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986) 5
United States v. *Boswell*, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978) 18
United States v. *Cloyd*, 819 F.2d 836 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2910 (1988) 38
United States v. *Curry*, 767 F.2d 328 (7th Cir. 1985) 21-22, 29
United States v. *David*, 844 F.2d 767 (11th Cir. 1988)... 38
United States v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984) 5
United States ex rel Toth v. *Quarles*, 350 U.S. 11 (1955)..... 30, 34
United States v. *Forbes*, 816 F.2d 1006 (5th Cir. 1987) .. 38
United States v. *Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, ___ U.S. ___, 108 S.Ct. 741 (1988)..... *passim*
United States v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988).. *passim*
United States v. *Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part*, 836 F.2d 1312, *cert. denied*, ___ U.S. ___, 109 S.Ct. 28 (1988)..... 38
United States v. *Hernandez*, 862 F.2d 17 (2d Cir. 1988) . 39
United States v. *Hvass*, 355 U.S. 570 (1958)..... 25
United States v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985) 5
United States v. *Raddatz*, 447 U.S. 667 (1980)..... *passim*
United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) 5

Table of Authorities Continued

Page

United States v. *Rodriguez-Suarez*, 856 F.2d 135 (11th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 875 (1989) 6, 29
United States v. *Trice*, 864 F.2d 1421, Dkt. No. 87-2452 (8th Cir., Dec. 29, 1988)..... 5, 17, 29, 49
United States v. *Wilson*, 816 F.2d 421 (8th Cir. 1987) ... 38
United States v. *Woods*, 364 F.2d 481 (3d Cir.), *cert. denied*, 395 U.S. 972 (1966) 23
United States v. *Woods*, 812 F.2d 1483 (4th Cir. 1987)... 38
Vasquez v. *Hillary*, 474 U.S. 254 (1986)..... 46
Vitek v. *Jones*, 445 U.S. 480 (1980) 46
Wade v. *Hunter*, 336 U.S. 684 (1949)..... 36
Wainwright v. *Witt*, 469 U.S. 412 (1985)..... 37, 40
Waller v. *Georgia*, 467 U.S. 39 (1984)..... 37, 46
Wimmer v. *Cook*, 774 F.2d 68 (4th Cir. 1985)..... 16, 29
Wingo v. *Wedding*, 418 U.S. 461 (1974)..... *passim*

LEGISLATIVE MATERIALS:

114 Cong. Rec. 27,342 (1968) 14
114 Cong. Rec. 28,360-61 (1968) 19
Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. (1968)..... 14, 19
Federal Magistrates Act: Hearings Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966)..... 14-15
H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252 .... 14, 19
H.R. Rep. 1609, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162..... 15, 17, 20-21, 24
Jurisdiction of United States Magistrates: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975)..... 23, 24, 28
S. Rep. No. 625, 94th Cong., 2d Sess. (1976) 20
S. Rep. No. 74, 99th Cong., 1st Sess. (1979)..... 28

Table of Authorities Continued

	Page
STATUTES & CONSTITUTIONAL PROVISIONS:	
U.S. CONST. AMEND. V.	*passim*
U.S. CONST. AMEND. VI.	8, 15, 30, 34, 36
U.S. CONST. ART. III.	*passim*
18 U.S.C. § 1952	1
18 U.S.C. § 1962	1
18 U.S.C. § 1963	1
18 U.S.C. § 3161	35
18 U.S.C. § 3231	29
18 U.S.C. § 3401	11, 12, 15, 24, 34
18 U.S.C. § 3402	16
18 U.S.C. § 3771	25
21 U.S.C. § 841	1
21 U.S.C. § 846	1
28 U.S.C. § 132	26
28 U.S.C. § 451	27
28 U.S.C. § 631	11
28 U.S.C. § 633	11
28 U.S.C. § 634	11
28 U.S.C. § 636	*passim*
28 U.S.C. § 1254	1
28 U.S.C. § 1861	7
28 U.S.C. § 1867	27
28 U.S.C. § 1869	26
Eastern District of New York Rules for Magistrates 1	43
Federal Magistrates Act, Pub. L. 90-578, Tit. I, § 101, 82 Stat. 1108 (1968)	11-12
Fed. R. Civ. P. 38	32
Fed R. Crim P. 1	26
Fed R. Crim P. 14	39
Fed. R. Crim. P. 23	16
Fed R. Crim P. 24	16
Fed. R. Crim. P. 25	24
Fed R. Crim P. 43	16
Fed. R. Evid. 105	3, 39
Fed. R. Evid. 403	39
Fed. R. Evid. 404	39

Table of Authorities Continued

	Page
Fed. R. Evid. 608	39
Fed. R. Evid. 609	39
Fed. R. Evid. 1101	26
Jury Selection and Service Act, Pub. L. 90-274, § 101, 82 Stat. 61 (1968)	7, 25-27
Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*	35
OTHER AUTHORITIES:	
Administrative Office of the United States Courts, Annual Report of the Director (1987)	42
G. Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* (Federal Judicial Center 1977)	42
Federalist No. 78 (Hamilton) (New American Library ed. 1961)	31
Federalist No. 83 (Hamilton) (New American Library ed. 1961)	33
Judicial Conference Committee on the Operation Of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409 (1960)	23
Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979)	31
Legal Manual for Magistrates (January 1983 ed.)	18
Letter dated February 16, 1989, from the Administrative Office of the United States Courts, Magistrates Division, to Counsel For Petitioners	42
18 U.S.C.A. Rule 54 (West 1976)	26
2 J. Story, *Commentaries on the Constitution of the United States* (1973)	31
2A Sutherland, *Statutory Construction* (4th ed. 1984)	13

OPINION BELOW

The opinion of the court of appeals is reported at 848 F.2d 1324 and reproduced at J.A. 21-48.[1] No opinion of the district court is reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. J.A. 21. A timely petition for rehearing was filed by petitioner Gomez and two co-defendants and denied on August 4, 1988, Judge Oakes dissenting. J.A. 49. Petitioners Gomez and Chavez-Tesina filed *pro se* petitions for certiorari and permission to proceed *in forma pauperis* on July 5 and July 22, 1988, respectively, which counsel supplemented on October 1, 1988. The two petitions were granted and consolidated on January 9, 1989, and petitioners were also permitted to proceed *in forma pauperis*. J.A. 51-52. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Eleven defendants, including petitioners, Jose Gomez and Diego Chavez-Tesina, were charged in a 21-count, superseding indictment filed July 7, 1986, in the United States District Court, Eastern District of New York, with various narcotics-related offenses committed between September 1985 and March 1986. J.A. 1. Gomez was charged with conspiracy to distribute, and actual distribution of, cocaine. 21 U.S.C. §§ 841 and 846 (1982 & Supp. IV 1986) (Counts 15 and 16). Chavez-Tesina was charged with similar violations (Counts 19 and 20), racketeering, 18 U.S.C. §§ 1962(c) and 1963 (1982) (Count 2), and violation of the Travel Act, 18 U.S.C. § 1952 (1982 and Supp. IV 1986) (Count 14).

On November 20, 1986, at a status conference, the District Judge, Joseph M. McLaughlin, scheduled jury selection before

---

[1] J.A. refers to the Joint Appendix filed in this Court. Pet. A. refers to the petitioners' appendix annexed to this brief.

a magistrate.[2] On February 9, 1987, counsel for the five defendants who had elected to stand trial appeared before A. Simon Chrein, Chief Magistrate. J.A. 2. The magistrate instructed counsel to inform their clients they had a "right" to trial before a district judge and that "I'm participating in the trial solely to the extent of selecting a jury," and to ask the defendants if they had any objection. J.A. 12.

Three defendants, including petitioners Gomez and Chavez-Tesina, objected, arguing through counsel that the magistrate did not have jurisdiction under the statute and Art. III of the Constitution to conduct the jury selection. J.A. 13-15. At first, the magistrate responded that the defendants would be free to ask Judge McLaughlin to select another jury panel. J.A. 14-15. When counsel responded that the court would be unlikely to do so after "what we are doing here," the magistrate reluctantly agreed to have his law clerk consult the court. J.A. 15-16. The magistrate then reported that "Judge McLaughlin's view of the law was the same as mine" and that petitioners would be deemed to have an objection. J.A. 16-17. The magistrate did not explain what review procedure, if any, the court expected to perform.

During the ensuing *voir dire* examination, Magistrate Chrein repeatedly referred to Judge McLaughlin's superior role in explaining the law and controlling trial procedure. Tr. 26, 87, 135-36.[3] Nevertheless, the magistrate delivered substantial, preliminary legal instructions and questioned the

---

[2] Because the Court Reporter's Office could not locate notes taken during this court session, it is not transcribed. Whether or not petitioners' *counsel* initially acceded to the court's decision, *see* J.A. 18-19, the District Court Docket Sheet does *not* indicate that petitioners were present, *see* Appellants' Joint Appendix in the Court of Appeals, p. 25, nor is there any other basis to infer that they initially consented.

[3] The transcript of the *voir dire* is not part of the record below and therefore is not included in the Joint Appendix. However, petitioners had the transcript prepared after certiorari was granted and have lodged it with the Clerk's office.

jurors about their ability to follow them. Tr. 17-48. He questioned the jurors, publicly and *in camera*, about their experience with and attitudes about drug-related and other crimes, excusing numerous jurors based upon their response, Tr. 48-76, and questioned each juror individually about his or her occupation and marital status. Tr. 97-129. Over petitioners' objection, he granted the government's request to ascertain whether any juror spoke Spanish. J.A. 10-11; Tr. 96-97.

Magistrate Chrein refused petitioners' repeated requests that the jurors be informed that the trial might last 3-4 weeks, Tr. 64, 67, 82-83, adopting instead the prosecutor's estimate of one week. Tr. 85. When several jurors expressed concern about scheduling conflicts, he excused two but denied petitioners' request to excuse a third, who feared his sister-in-law's death and funeral were imminent. Tr. 87-94.[4] After the government consented to the defendants' one formal challenge for cause, Tr. 126, the parties exercised their peremptory challenges and the jury selection was completed. Tr. 130-33.

On February 17, 1987, petitioners appeared for trial before Judge McLaughlin and, through counsel for a co-defendant, renewed their objection to the delegation of jury selection. J.A. 17-19. Judge McLaughlin offered to review any denial by Magistrate Chrein of defense challenges for cause, but petitioners did not invoke such "review" since petitioners' one formal challenge had been granted. J.A. 18-19. The court did not offer *de novo* review of any other aspect of the selection process, nor did the court order or review the *voir dire* transcript. The jury was sworn and testimony began. Ten days later, the jury found petitioners guilty on all counts.[5]

---

[4] The transcript does not contain this juror's name or otherwise reflect whether the defense was forced to use a peremptory challenge to excuse the juror.

[5] During the trial, Judge McLaughlin repeatedly refused to give contemporaneous, limiting instructions under Fed. R. Ev. 105 to protect Gomez where the government offered co-conspirator hearsay or physical evidence against Chavez-Tesina or the other defendants.

Following sentencing, all five defendants appealed to the United States Court of Appeals for the Second Circuit and sought reversal of their convictions and a new trial on the ground that the district judge's delegation of jury selection to the magistrate had violated their rights under the Federal Magistrates Act [hereinafter the "Act"], 28 U.S.C. §§ 631-39, and Art. III and the Due Process Clause of the United States Constitution. Joint Opening Brief for Appellants Jose Gomez and Beimar Vallejo at 29-38.

Rejecting this argument, the court, over the dissent of (now Chief) Judge Oakes, affirmed the convictions. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988). In an opinion by Judge Cardamone, joined by Judge Mahoney, the court held that the Act, which carefully specifies the duties magistrates may perform as well as standards and procedures for district court review, permits jury selection to be delegated under a clause authorizing magistrates to perform "additional duties . . . not inconsistent with the Constitution and laws of the United States." *Id.* at 1329-30, J.A. 28-30, citing 28 U.S.C. § 636(b)(3). The majority further held that the district judge's offer of *de novo* review of unsuccessful challenges for cause satisfied petitioners' rights under Art. III. *United States* v. *Garcia*, 848 F.2d at 1330-33, J.A. 30-37. The court did not address the due process issue.

Judge Oakes' dissent reasoned that delegation of jury selection to a magistrate, even where the district judge offers *de novo* review, raises serious constitutional questions. Judge Oakes argued that such delegation demeans a process that the Supreme Court repeatedly has held is a critical, first stage of

---

While the racketeering charge against Chavez-Tesina involved a seven-month period and seven acts of racketeering, the indictment charged Gomez with a discrete, three-day involvement involving one substantive transaction. Petitioner Gomez's claim of error was rejected in the Court of Appeals. *United States* v. *Garcia*, 848 F.2d 1324, 1334-35 (2d Cir. 1988). J.A. 22-24, 40-42. While Gomez does not directly raise this issue here, the trial court's ability to assess the "effectiveness" of limiting instructions where he absented himself during the *voir dire* is discussed *infra* at 38-39.

the criminal trial; further concluded that *de novo* review would be impractical and perhaps illusory; and advocated prohibiting the procedure under the court's supervisory power. *United States* v. *Garcia*, 848 F.2d at 1337-38 (dissenting opinion), J.A. 46-48.

Gomez and Chavez-Tesina sought *certiorari* to review whether delegation of jury selection to a magistrate in a felony case, over a defendant's objection, is authorized by the Federal Magistrates Act and, if so, whether it meets Art. III and Due Process Clause requirements.[6] Agreeing that these issues were important and that the Court should resolve the split amongst the circuits,[7] the government joined in the request

---

[6] A joint petition on behalf of co-defendants William Salazar and Beimar Vallejo, No. 88-5795, is pending. The Solicitor General suggested that its resolution be delayed pending determination of this appeal, principally because of the parties' belief, based upon the available record, that Vallejo had waived any objection during proceedings before the magistrate. However, the transcript of the actual *voir dire* questioning, prepared after *certiorari* was granted, reveals that Vallejo's counsel did, in fact, add his client's objection to that of petitioners. Tr. 44. (Vallejo's appellate counsel was not the attorney at trial.)

[7] Two circuits have held that the procedure exceeds the scope of the Magistrates Act. *United States* v. *Trice*, 864 F.2d 1421, ——, No. 87-2452, slip op. at 6-17 (8th Cir., Dec. 29, 1988) (convictions reversed); *United States* v. *Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, — — U.S. ——, 108 S.Ct. 741 (1988) (conviction affirmed due to appellant's failure to object in the district court). Two circuits have upheld the procedure on statutory and constitutional grounds, despite the defendants' timely objection. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988); *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985); *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986). In the absence of timely objection, the First Circuit found no plain error and affirmed. *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983). *Accord*, *United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984). Finally, one court declined to reach the merits because of its conclusion that the defendant had not

for further review. On January 9, 1989, the Court agreed to hear this appeal and to permit petitioners to proceed *in forma pauperis*.

SUMMARY OF THE ARGUMENT

I. The Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1982), authorizes federal judges to delegate their less significant tasks to magistrates so that the judges may perform their most important "traditional adjudicatory duty": the trial of felony cases. Mindful of litigants' Art. III and due process rights, Congress carefully circumscribed magistrates' trial jurisdiction and, in respect to all but the most ministerial or administrative tasks, set forth a procedure and standard for district court review. By permitting assignment of "additional duties . . . not inconsistent with the Constitution and the laws of the United States," 28 U.S.C. § 636(b)(3), Congress certainly did not intend to create jurisdiction for magistrates to conduct the "traditional adjudicatory duty" of jury selection at a felony trial. Such a construction would render superfluous the balance of this comprehensive act.

In the original, 1968 Act, Congress limited magistrates' trial jurisdiction to certain misdemeanor and petty offenses, and only on consent of all parties. While the legislative history of the 1968 Act contains no explicit discussion of jury selection, Congress must be presumed to have been aware that judicial precedent, rules and practice regarded jury selection as part of the trial and required district judges to personally preside. Thus, Congress' determination to deny magistrates any felony trial jurisdiction encompassed jury selection.

In 1976, Congress amended the statute in response to the courts' interpretation of the existing "additional duties" clause, § 636(b). Congress clarified the categories of pretrial and post-

---

demonstrated prejudice. *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 139 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 875 (1989). The opinion in the latter case does not disclose whether the defendant objected in the district court.

trial duties that magistrates could perform and established a comprehensive review structure. The only duties for which Congress prescribed no procedure or standard for review were certain ministerial or administrative tasks—and undefined "additional duties" under new § 636(b)(3).

The legislative history of the 1976 amendment completely forecloses the court of appeals' illogical view that Congress, while attempting to clarify the statute's scope and review procedures, intended district judges, in their sole discretion, to freely assign "additional duties" no matter how constitutionally significant the function. While the House and Senate committee reports state that § 636(b)(3) was intended to permit district courts to "experiment" in the assignment of "additional duties" outside the category of "pretrial matters," Congress explained that the tasks it had in mind were "more administrative functions . . . in aid of the business of the courts." The purpose of assigning such functions was to make "increased time available to judges for the careful and unhurried performance of their vital and *traditional adjudicatory duties* . . ." (emphasis added). The legislative history further shows that Congress understood that the quintessential "traditional adjudicatory duty" was the felony trial—of which jury selection is a vital part. Indeed, the 1976 amendment was proposed by the Judicial Conference, which, consistent with history and practice, had omitted jury selection from its list of "additional duties" that magistrates were authorized to perform. In revisiting the statute, Congress' failure to disapprove the existing administrative interpretation was "persuasive evidence" that the interpretation was the "one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (hereinafter "*Schor*").

Delegation of jury selection in felony trials is also "inconsistent with the . . . laws of the United States," specifically, Fed. R. Crim. P. 24(a), which has the force of law, and the Jury Service and Selection Act, 28 U.S.C. §§ 1861 *et seq.*, and therefore is not authorized under § 636(b)(3). These "laws" authorize jurors to be selected or challenged only in the pres-

ence of the "court." The federal rules and all relevant provisions of the United States Code exclude "magistrate" from the definition of "court." In *Wingo* v. *Wedding*, 418 U.S. 461, 468-69, 472 (1974), this Court held that magistrates could not conduct habeas corpus hearings, because the Habeas Corpus Act only permitted such hearings to be conducted by "[t]he court, or justice, or judge." The 1976 amendment to the Magistrates Act partially overrode this decision by authorizing magistrates to handle pretrial and specified posttrial duties "notwithstanding any law to the contrary." It did not override *Wingo* with respect to the "additional duties" authorized by § 636(b)(3).

Finally, the consent and review provisions of the Magistrates Act reflect Congress' determination to avoid constitutional conflict in the administration of the statute. Consistent with this legislative intent as well as principles of statutory construction, the Court should construe the statute to avoid the serious constitutional questions raised by delegation of felony jury selection to a magistrate over the defendant's objection.

II. Even if Congress intended to authorize the assignment of jury selection to magistrates, such a procedure violates a felony defendant's individual right under Art. III of the Constitution to adjudication by a district judge. Art. III's lifetime tenure and irreducible salary provisions protect the litigant's interest in impartial, independent adjudication by judges insulated from outside pressure. The Court has recognized that, depending upon the importance of the individual's Art. III interest, the right to adjudication by an Art. III judge may be absolute. *Schor*, 478 U.S. at 848. There can be no greater interest in Art. III adjudication than during a felony jury trial.

The trial judge's role during jury selection is so crucial, both to the selection of an impartial jury and to the conduct of the remainder of the trial, that jury selection may not be distinguished from the subsequent phases of trial for purposes of Art. III. Selection of an impartial jury is specifically guaranteed by the Sixth Amendment and is indispensable to a fair trial. During *voir dire*, the judge must preliminarily instruct the prospective jurors on the law and must determine appro-

priate questions to ascertain whether each juror is racially or otherwise biased or unfit to serve. He may also be required to evaluate whether the prosecutor's motives in exercising peremptory challenges are racially discriminatory, *Batson* v. *Kentucky*, 476 U.S. 79, 86 (1986), or whether the jury *venire* as a whole is tainted by prejudicial, pretrial publicity. All judicial judgments during *voir dire* are inherently subjective, requiring the judge to rely upon his immediate perceptions of the participants' manner as much as their words, and as such are inherently unreviewable by another tribunal. In addition, jury selection is inseparable from the balance of the trial because the trial judge's subsequent determination of juror misconduct allegations, the effectiveness of limiting instructions, and the admissibility of evidence with a potential for prejudicing or confusing the jury, all require that the judge has personally observed the jury's behavior and comments during jury selection.

"*De novo* review" of the magistrate's decisionmaking during *voir dire* does not save its constitutionality. The Act's *de novo* review procedure for suppression hearings is constitutional because the district court independently determines such motions based upon the magistrate's proposed findings of fact and conclusions of law, and the hearing transcript. *United States* v. *Raddatz*, 447 U.S. 667 (1980). In contrast, the statute contains no procedure for review of the magistrate's selection of a jury, which implicates the defendant's superior constitutional interest in the reliability of the trial. *Id.* at 678-79. Rather, a magistrate merely presents the court a "final determination": a panel of jurors ready to be sworn. Even if, unlike this case, the court possesses a transcript, the questioning of each juror will have been far briefer than that of a suppression hearing witness. The district court will have no choice but to accept the magistrate's credibility determinations, thus applying a constitutionally-impermissible "clearly erroneous or contrary to law" standard. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality opinion). The court will not be able to requestion jurors who were the subject of a disputed challenge for cause: jurors erroneously excused at

the prosecutor's request, or peremptorily excused by the defense following the denial of a challenge for cause, will no longer be available. For the court to reinstruct the jurors on principles of law or reexamine a juror would only reinforce the jurors' diminished view of jury selection as "essentially clerical."

III. Even if petitioners' right to an Art. III adjudication was not absolute during their jury selection, the assignment of this important function to a magistrate violated their right to due process of law. Under the due process analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), petitioners' private interest in an Art. III adjudication of jury selection at their felony trial was of the highest magnitude. Similarly, the risk of an erroneous determination was high, since Art. III presumes that a judicial officer without lifetime tenure or an irreducible salary cannot exercise impartial, independent judgment, and jury selection requires numerous such judgments. In this context, *de novo* review cannot detect or correct errors, nor was the review offered in this case more than a "facade": immediately before taking opening statements, the court, with no prior notice and without a transcript, offered to review unsuccessful defense challenges for cause, but no other aspect of the jury selection process. The public interest in the appearance and reality of impartial, independent adjudication during criminal trials is high; the government's need for the delegation procedure, which has been sparingly used by the district courts, is nonexistent. Rather than add a new procedural protection, petitioners merely seek to preserve the historic right of criminal defendants to the presence of a district judge at jury selection.

Because the magistrate was not empowered by Congress to conduct jury selection, he lacked jurisdiction to act. Whether invalidated on statutory or constitutional grounds, the procedure of delegating jury selection violates a defendant's basic constitutional right to a trial before a duly constituted, independent tribunal, and to an impartial jury selected by that tribunal, and is not susceptible to "harmless error" analysis. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A DISTRICT JUDGE TO DELEGATE JURY SELECTION TO A MAGISTRATE IN A FELONY TRIAL WITHOUT THE DEFENDANT'S CONSENT

A. The Evolution And Present Structure Of The Act

The position of federal magistrate was established in 1968 to replace and upgrade the existing, inadequate United States commissioner system. *See generally Mathews* v. *Weber*, 423 U.S. 261, 266-70 (1976); *Wingo* v. *Wedding*, 418 U.S. 461, 462-63 (1974); *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 350-59 (7th Cir. 1972). Congress created a new system of full- and part-time judicial officers serving eight- and four-year terms, respectively. Federal Magistrates Act of 1968, Pub. L. 90-578, Tit. I, § 101, 82 Stat. 1108 (1968) (current version at 28 U.S.C. § 631(e) (1982)). Under the legislative scheme, the Judicial Conference creates each position; a majority of the judges within each district fills it. 28 U.S.C. §§ 631(a), 633(b) (1982). These judges can remove a magistrate for "cause," 28 U.S.C. § 631(i)(1982) (original version at § 631(h)), or the conference can terminate the position for lack of need. §§ 631(i), 633(c), (1982). While the conference fixes salary levels, no magistrate's salary can be reduced below the level in place at the beginning of his term. 28 U.S.C. § 634(b) (1982).

The original Act defined the "jurisdiction and powers" of magistrates in § 636. Pub. L. 90-578, Tit I, § 101, 82 Stat. 1113 (1968). Subsection "a" authorized magistrates to perform the former duties of U.S. commissioners, to administer oaths and affirmations, and to conduct trials of certain "minor" misdemeanor or petty offenses as set forth in 18 U.S.C. § 3401, *as amended*, Pub. L. 90-578, Tit. III, § 302(a), 82 Stat. 1115 (1986). The latter section required that the magistrate inform the defendant of his *right* to trial before the district court and, where appropriate, his *right* to trial by jury. 18 U.S.C. § 3401(b), *as amended*, Pub. L. 90-578, *supra*. To invoke the magistrate's trial authority, the defendant had to waive *both*

rights; magistrates were not empowered to conduct jury trials, regardless of the defendant's willingness to consent. *Id.*

Subsection "b" permitted a majority of the judges within each district to adopt rules authorizing magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." These "additional duties" included, but were not restricted to, serving as a special master, assisting in pretrial or discovery proceedings in civil and criminal actions, and conducting a "preliminary review" of applications for posttrial relief in criminal cases "as to whether there should be a hearing." Pub. L. No. 90-578, Tit. I, § 101, 82 Stat. 1113 (1968).

In response to *Wingo* v. *Wedding*, 418 U.S. 461 (1974), in which this Court held that the "additional duties" subsection did not authorize magistrates to conduct, as opposed to recommend, a habeas corpus evidentiary hearing, Congress rewrote subsection "b". The 1976 amendment explicitly set forth the magistrate's range of pretrial and posttrial duties, § 636(b)(1)(A)-(B)(1982), but did not substantially alter his limited criminal trial jurisdiction. In addition, the amendment retained an identical "additional duties" clause, but placed it in a separate subsection, § 636(b)(3).

Finally, in 1979, Congress added new subsection "c", authorizing magistrates, with the parties' consent, to try any civil case, jury or non-jury. It also amended 18 U.S.C. § 3401(a), reproduced at Pet. A. 1-2, to permit magistrates, with the defendant's consent, to conduct criminal jury trials, but limited such jurisdiction to misdemeanors.

B. Delegation Of Felony Jury Selection Is Inconsistent With The Entire Statutory Scheme Enacted By Congress In The Federal Magistrates Act.

1. The Statute Specifically Excludes Magistrates From Conducting Felony Trials, As To Which Congress Understood Jury Selection To Be An Integral Part

"[A] section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369

U.S. 1, 11 (1962). A single sentence cannot control where it is inconsistent with "the provisions of the whole law, . . . its object and policy." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Richards* v. *United States*, *supra*; *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956). "[W]ords of general meaning" should not be literally applied in contravention of the balance of the legislation or the demonstrable intentions of the drafters. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892). *See generally* 2A Sutherland, *Statutory Construction* § 46.05 (4th ed. 1984).

Consistent with these principles, in *Wingo* v. *Wedding*, *supra*, the Court declined to uphold the assignment to a magistrate of a habeas corpus hearing under the 1968 Act's "additional duties" clause because the balance of the statute implicitly precluded such a delegation of authority. The Act expressly authorized magistrates to recommend "*whether* there should be a hearing," thereby "compel[ling] the conclusion that Congress made a deliberate choice to preclude district courts from assigning magistrates the duty to hold evidentiary hearings." 418 U.S. at 472 (emphasis added), construing 28 U.S.C. § 636(b) (1968 version). The Court noted, "Where Congress gave magistrates authority to conduct hearings, the authority was express and circumscribed with procedural safeguards." *Id.* at 470 n.11.

The history and structure of the Act compel the same conclusion regarding felony jury selection: Congress did not intend the "additional duties" clause to authorize magistrates to conduct this procedure, which Congress understood to be the first phase of trial, with or without *de novo* review. Congress originally decided in 1968 to limit magistrates' criminal trial jurisdiction to certain misdemeanors, which it termed "minor" offenses, after a vigorous legislative debate about the constitutionality of even this limited trial jurisdiction. However, Congress concluded that "it is constitutionally permissible to entrust the trial of minor offenses to U.S. magistrates *under the conditions set forth in S. 945* (emphasis added)."

H.R. Rep. No. 1629, *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4264 [hereinafter "1968 House Report"]. The conditions included limiting such jurisdiction to "minor" crimes (misdemeanors) and requiring the defendant's consent.[8]

Congress did not contemplate extending magistrates' limited trial authority to felonies. It understood that a defendant's Art. III and due process claims were far stronger in the felony context. The bill's principal sponsor, Sen. Tydings, calmed a representative's fear that the bill might be construed to empower magistrates "to try felonies" by responding: "No. Absolutely not, but, as I say, the Constitution and the laws of the United States preclude that." *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 88 (1968) [hereinafter "1968 House Hearings"]. Similarly, a Senate subcommittee staff memorandum observed: "When a crime reaches a certain level of seriousness, the Constitution guarantees the accused that the trial be by jury, before an Article III judge." *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 16 (1966) [hereinafter "1966 Senate Hearings"].

Subsequent amendments to the Act reinforced the Congressional intent to exclude felony trial proceedings from the jurisdiction of magistrates. In 1976, while concentrating on the reconstruction of § 636(b), Congress did not expand magistrates' criminal trial jurisdiction. H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6168 (hereinafter "1976 House Report"). In 1979, Congress amended 18 U.S.C § 3401(a) to authorize magistrates to conduct misdemeanor jury trials, and created civil jury trial jurisdiction, 28 U.S.C. § 636(c), in both cases requiring consent. Congress added no statutory language, and otherwise expressed no intent, to give magistrates any felony trial jurisdiction.

In circumscribing the criminal trial jurisdiction of magistrates to crimes less serious than felonies, Congress must have intended to preclude magistrates from exercising jurisdiction to select felony juries. Congress is presumed to act with awareness of constitutional precedent, statutory rules, and current practice. *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987); *Lorillard* v. *Pons*, 434 U.S. 575, 581-82 (1978). Prior to the 1976 amendments, the Court had consistently viewed jury selection as part of the "trial." *See, e.g., Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976) (*trial* judge plays critical role during jury selection to protect the defendant's Sixth Amendment right to an "impartial jury"); *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973) (same); *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) (peremptory challenge process "is a necessary part of trial by jury"); *Frank* v. *Mangum*, 237 U.S. 309, 338-39 (1915) (defendant's right to be present at *trial* begins with jury selection); *Diaz* v. *United States*, 223 U.S. 442, 455 (1912) (same); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-15, (1899) ("trial by jury" includes a "'a body of twelve men . . . *duly empanelled under the direction of a competent court* . . .' [citation omitted]") (emphasis added). *Cf. Downum* v. *United States*, 372 U.S. 734,

---

[8] Assistant Attorney General Fred M. Vinson, Jr., in influential testimony, opposed expanding the commissioners' existing petty offense trial jurisdiction on Art. III grounds, even with consent. *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 109 (1966). Subsequently, the legislation's principal sponsor, Sen. Tydings, reiterated the importance of consent to avoid Art. III and due process problems. *Federal Magistrates Act: Hearings before Subcomm. No.4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 72-73 (1968).

During extensive floor debate, Rep. Poff countered Rep. Cahill's forceful argument that the magistrates' minor offense jurisdiction would be unconstitutional, stressing "[t]he intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case . . . ." 114 Cong. Rec. 27,342 (1968).

737 (1963) ("discontinuation" of trial before opening statements violated defendant's double jeopardy rights, which attached when jury was sworn).

Reflecting this case law, the Federal Rules of Criminal Procedure, effective March 21, 1946, had included the provisions pertaining to jury selection, Rules 23 and 24, within the chapter entitled "Trial." *See also* Fed. R. Crim. P. 43(a) (defendant's presence required "at every stage of the trial *including* the impaneling of the jury") (emphasis added). In sum, Congress must have understood its limitation of magistrates' felony trial jurisdiction encompassed jury selection for such trials.

The statute's comprehensive trial jurisdiction provisions, reflecting extensive Congressional consideration and reconsideration, "established the exclusive method for the exercise of such jurisdiction and power by a federal magistrate." *Wimmer* v. *Cook*, 774 F.2d 68, 73 (4th Cir. 1985) (civil trials).[9] As in *Wingo* v. *Wedding*, Congress' omission of jury selection from this jurisdictional structure "illuminated" its purpose not to authorize magistrates to conduct this important function. *United States* v. *Ford*, 824 F.2d 1430, 1437 (5th Cir. 1987) (en banc), *cert. denied*, ___ U.S. ___, 108 S.Ct. 741 (1988).

Congress' purpose is further "illuminated" by its failure to provide any framework for district court review of magistrate-conducted felony jury selection. Where Congress authorized magistrates to exercise trial jurisdiction, it specifically provided for Art. III appellate review. *See* 18 U.S.C. § 3402; 28 U.S.C. § 636(a)(3), (c)(3)-(5). Where it authorized magistrates to hear substantive pretrial or posttrial matters, it similarly required review, linking the comprehensiveness of the review to the importance of the procedure. Thus, magistrates may

[9] *See Hall* v. *Sharpe*, 812 F.2d 644, 648 (11th Cir. 1987) (exclusive source of authority for magistrates to conduct civil trials is now § 636[c]); *In re Wickline*, 796 F.2d 1055, 1056-59 (8th Cir. 1986) (same); *see also Banks* v. *United States*, 614 F.2d 95, 97 (6th Cir. 1980) ("additional duties" clause did not authorize referral of a probation revocation hearing).

enter an order "determin[ing]" *non-dispositive* pretrial matters, subject to review by a deferential "clearly erroneous or contrary to law" standard, § 636(b)(1)(A); but they may only "recommend" determination of *dispositive* pretrial and post-trial applications, subject to *de novo* review. § 636(b)(1).[10] The only functions carrying no provision for district court review are essentially ministerial or otherwise far removed from trial, such as administering oaths, taking depositions, or fixing bail, § 636(a)(1)-(2)—and the "additional duties" under § 636(b)(3). Congress would not have established this comprehensive review structure only to authorize felony jury selection as one of these unspecified "additional duties" with "*no* provision for review." *United States* v. *Ford*, 824 F.2d at 1437 (emphasis in original).

The conclusion below that Congress intended to authorize assignment of jury selection with *de novo* review is still further contradicted by the statute's limited authorization for such review. The statute authorizes *de novo* review only for the eight dispositive pretrial or posttrial applications specifically listed in § 636(b)(1)(B). The 1976 amendment that incorporated this provision into the Act was intended to "emphasize[] and clarif[y] when a de novo determination must be made by the judge." 1976 House Report, *supra*, at 3, 1976 U.S. Code Cong. & Admin. News at 6163. To permit district judges to exercise *de novo* review at their whim defeats Congress' purpose to

[10] Congress could not have understood felony jury selection to fall under § 636(b)(1), which pertains to "any pretrial matter" and certain posttrial applications. Jury selection is not among the eight "dispositive" motions for which a magistrate may "recommend" decision subject to review. *Hall* v. *Sharpe*, 812 F.2d 644, 647 (11th Cir. 1987); § 636(b)(1)(B). On the other hand, no court has held that Congress intended to equate felony jury selection with the remaining pretrial matters magistrates may "determine," subject to review only by a "clearly erroneous or contrary to law" standard. "Subparagraph (A) [is] plainly intended for less important matters than voir dire." *United States* v. *Trice*, *supra*, 864 F.2d at ___, slip op. at 12-15.

clarify when such a standard should be employed. In this regard, the courts may not remake a statute to save its constitutionality by inserting a procedural safeguard that Congress chose to omit. *Crowell* v. *Benson*, 285 U.S. 22, 77 (1932) (Brandeis, J., dissenting). This is a "subject . . . for legislation —not adjudication." *Fuentes* v. *Shevin*, 407 U.S. 67, 96-97 (1972) (legislature, not courts, must promulgate hearing procedure to save constitutionality of statute authorizing prejudgment replevin).

By construing the general language of § 636(b)(3) to override the balance of this carefully-structured, oft-amended, comprehensive statute, the Second Circuit rendered Congress' laborious efforts "superfluous." *United States* v. *Ford*, 824 F.2d at 1438. Under its reasoning, "the additional duty language was all that was necessary. Fairly read in context, Congress never intended that this language swallow all that preceded it." *Id.*[11]

[11] Although the Administrative Office of the United States Courts lists *voir dire* as an "additional duty" authorized by § 636(b)(3), *Legal Manual for Magistrates* 3-15 (January 1983 ed.), the manual also notes, in a section entitled "Limitations Upon a Magistrate's Jurisdiction," that because "Title 18 U.S.C. § 3401 *specifically limits* a magistrate's trial jurisdiction in criminal cases to misdemeanors, a magistrate has no jurisdiction to try felony cases, even upon consent . . . . Accordingly, a magistrate's authority in a felony case is limited to: (1) the conduct of initial proceedings under 28 U.S.C. § 636(a); and (2) the conduct of other proceedings on reference from a district judge under 28 U.S.C. § 636(b) [footnote omitted]." *Id.* at 3-19 (emphasis added). Significantly, the footnote then states: "A magistrate, for example, should *not* substitute for a judge at trial proceedings in criminal cases." *Legal Manual* at 3-19 n.52 (emphasis added), citing *United States* v. *Boswell*, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978) (magistrate presided during summations due to judge's illness). If jury selection is part of the trial, it is difficult to reconcile this analysis with the manual's approval of *voir dire* delegation, unless such approval was meant to apply only to civil cases.

2. The Legislative History Shows That Congress Intended 'Additional Duties' To Include Routine, Non-Adjudicative Tasks, Not Jury Selection

During the legislative debate concerning the 1968 Act, Sen. Tydings, the principal sponsor, explained that the "additional duties" subsection was intended to "eas[e] some of the *routine nonjudicial burdens* of [district] courts. . . . [U]se of magistrates as aides to judges in such matters is sure to increase the time available to those judges for the *careful and unhurried performance of their traditional adjudicatory duties.*" 1968 House Hearings, *supra*, at 73 (emphasis added). Similarly, during the extensive House floor debate, Rep. Poff, a strong proponent of the legislation, answered an opponent's concern that the "additional duties" subsection would constitute "an improper and vague delegation of legislative power to the courts" as follows:

> [A]s a *matter of legislative history*, I would like to emphasize that the subcommittee raised that question during its intensive study of this bill and *it was agreed that this section was not in any way intended as the predicate for expanding the jurisdiction of the magistrate.*

114 Cong. Rec. 28,360-61 (1968) (emphasis added).[12]

The court of appeals' statutory analysis relies upon the legislative history of the 1976 amendment to support its conclusion that, in 1976, Congress intended an identically-worded "additional duties" clause to be a far broader grant of authority than

[12] This explanation was consistent with the House Report, which explained that the three listed "additional duties" were "intended to illustrate the general character of duties assignable to magistrates under the act . . ." 1968 House Report, *supra*, 1968 U.S. Code Cong. & Admin. News at 4262. The three duties—serving as a special master in certain civil actions, "assisting" in pretrial or discovery proceedings, and reviewing postconviction petitions—were limited in scope and/or preliminary to a criminal trial. They did not suggest any intent to enhance the magistrate's jurisdiction beyond the scope of the balance of the statute.

in 1968. The court quoted committee reports which stated that Congress had placed the "additional duties" clause in a separate subsection, in contrast to the 1968 Act, to emphasize that the provision was "not restricted in any way by any other specific grant of authority to magistrates." *United States* v. *Garcia*, 848 F.2d at 1329, J.A. 28-29, quoting 1976 House Report, *supra*, at 12, 1976 U.S. Code Cong. & Admin. News at 6172; S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976). In addition, the reports stated:

> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

Id., quoted in *United States* v. *Garcia*, *supra*.

However, the balance of these reports, which the court omitted, makes clear that Congress, as in 1968, wanted the courts to "experiment" with assigning "routine, non-adjudicative duties," not "traditional adjudicatory duties" such as felony jury selection. The purpose of the 1976 amendments also was to *clarify* the magistrates' "additional duties," not to create a more ambiguous grant of authority than the statute already contained.

Thus, the reports explained that the bill was intended to "clearly defin[e] the additional duties" assignable under existing subsection "b", which contained ambiguous language that several courts had narrowly construed.[13] 1976 House Report, *supra*, at 7-8, 1976 U.S. Code Cong. & Admin. News at 6167-68; *see* 1976 House Report, *supra*, at 2 ("clarify and further define"). These clearly-defined duties were to include disposing of "minor and petty criminal offenses," conducting

[13] *See, e.g., Wingo* v. *Wedding*, 418 U.S. 461 (1974); *Ingram* v. *Richardson*, 471 F.2d 1268 (6th Cir. 1972) (magistrate could not review an administrative denial of social security benefits and make proposed findings of fact and conclusions of law); *T.P.O., Inc.* v. *McMillen*, 460 F.2d 348 (7th Cir. 1972) (magistrate could not decide certain dispositive civil motions subject to the district court's review).

"preliminary or pretrial processing of both criminal and civil cases," and hearing "dispositive motions and evidentiary hearings." *Id.* at 5. Congress' overall intent was no different than in 1968: to "assist the district judge in a variety of *pretrial and preliminary* matters thereby facilitating the *ultimate and final exercise of the adjudicatory function at the trial of the case.*" *Id.* at 7 (emphasis added).

While the reports then explained, as the court of appeals noted, that the "additional duties" clause had been placed in a separate subsection so as to "emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates," *id.* at 12, the reports adopted verbatim, *see supra* at 19, Sen. Tydings' language in 1968 explaining the limited nature of the experimentation Congress had in mind:

> This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more *administrative functions* to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.
>
> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the *careful and unhurried performance of their vital and traditional adjudicatory duties*, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

Id. (emphasis added).

Thus, Congress in 1976 intended the "additional duties" authorized by § 636(b)(3) to be essentially ministerial or non-adjudicative. *United States* v. *Ford*, 824 F.2d at 1438 ("additional duties" clause is a "residuum" that does not authorize delegation of tasks "that Congress never envisioned would be delegated"); *Hall* v. *Sharpe*, 812 F.2d 644, 648 (11th Cir. 1987) ("procedural and administrative matters"); *United States* v.

Curry, 767 F.2d 328, 330 (7th Cir. 1985) ("mostly . . . routine duties") *Banks* v. *United States*, 614 F.2d 95, 97 (6th Cir. 1980) ("procedural and administrative matters"). Congress' purpose remained, as Sen. Tydings had explained in 1968, to free district judges to perform their "traditional adjudicatory duties" —the trial of cases, especially felony cases—not to assign such duties to magistrates. The court of appeals' construction of the clause as an unlimited grant of primary authority conflicts with Congress' express intent to "clarify" the "additional duties" authorized by former, ambiguous § 636(b).

Finally, Congress' intention that § 636(b)(3) authorize district judges to delegate minor, administrative duties, as opposed to substantive, adjudicatory functions, is further demonstrated by Congress' differentiation in its use of key statutory language. Intending a broad grant of jurisdiction to magistrates over "any pretrial" and certain posttrial matters, Congress prefaced § 636(b)(1) with the explanation that such duties were authorized "[n]otwithstanding any laws to the contrary." In contrast, it omitted such a jurisdictionally-enhancing clause in § 636(b)(3), directing, to the contrary, that "additional duties" were not to be "inconsistent with the . . . laws of the United States." Congress is presumed to act purposefully in the "disparate inclusion or exclusion" of particular language in different sections of the same act. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The language and history of the statute demonstrate that Congress acted purposefully here.

3. Congress' Failure In 1976 To Override The Existing Practice That District Judges Preside At Jury Selection Confirms That The Act Does Not Permit Delegation Of Jury Selection To Magistrates

Congress presumably was aware, prior to the 1968 Act, that district judges always presided at jury selection, but it did not manifest any intention to alter this uniform practice. A nationwide study had documented that, as of 1960, district judges presided over *voir dire* in all but two districts, the Eastern and Western Districts of Pennsylvania, where the judge remained

available to resolve disputes but was not necessarily present during the entire *voir dire*. Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 466-67 (1960). However, reported cases made clear that, even in these two districts, judges did not absent themselves unless the defendant explicitly or implicitly consented, *see Haith* v. *United States*, 231 F. Supp. 495, 498 (E.D. Pa. 1964), *aff'd*, 342 F.2d 158 (3d Cir. 1965), and, in any event, the Third Circuit then forbade the practice irrespective of waiver. *Stirone* v. *United States*, 341 F.2d 253, 256 n.3 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965); *United States* v. *Woods*, 364 F.2d 481, 483 (3d Cir.), *cert. denied*, 395 U.S. 972 (1966) ("the voir dire examination is an integral, vital element of a fair trial"). Thus, by 1968, the trial judge presided at *voir dire* in every federal court.

In amending the Magistrates Act in 1976, Congress adopted legislation that the Judicial Conference had proposed. *Jurisdiction of United States Magistrates: Hearing Before the Senate Subcomm. on Improvement in Judicial Machinery of the Comm. on the Judiciary*, 94th Cong., 1st Sess. 1 (1975) [hereinafter "1975 Senate Hearings"]. But the Judicial Conference itself, consistent with the universal practice, had omitted jury selection from the "additional duties" it authorized magistrates to perform in a comprehensive Administrative Office memorandum distributed to all district judges and magistrates in 1975, and reprinted in the legislative record. 1975 Senate Hearings, *supra*, at 22-26.[14]

Faced with this narrow interpretation of the existing law, Congress did not indicate anywhere during its consideration of the 1976 amendments that it disapproved of the Administrative Office/Judicial Conference view or intended to alter the existing practice. This is "persuasive evidence" that the admin-

---

[14] While the Administrative Office presently lists "jury selection" as an "additional duty," its discussion elsewhere of magistrates' limited criminal trial jurisdiction suggests that it may have had *civil* jury selection alone in mind. *See supra* at 18 n.11.

istrative interpretation "is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) ("*Schor*").[15]

Indeed, the 1976 revision did not even permit magistrates to preside at jury selection during *misdemeanors*, let alone felonies. Congress that year did not materially revise 18 U.S.C. § 3401, which required misdemeanor defendants to waive their right to a jury trial in order to be tried by a magistrate. Thus, if the court of appeals is correct, Congress in 1976 authorized magistrates to select *felony* juries over the defendant's *objection*, but prohibited magistrates from selecting *misdemeanor* juries with the defendant's *consent*. Congress' view that an accused felon has a greater claim to an Art. III adjudication

[15] The only trial function included on the Administrative Office's list was "[a]cceptance of jury returns in the absence or disability of the trial judge" in *civil* proceedings. 1975 Senate Hearings, *supra*, at 24-25. The House Report listed this function as a possible "additional duty" under 636(b)(3), but did not make clear whether it too was referring only to civil cases. 1976 House Report, *supra*, at 12, 1976 U.S. Code Cong. & Admin. News at 6172. However, this must have been its intent, since Fed. R. Crim. P. 25(a) requires that another "judge" finish a criminal trial when the original judge becomes disabled. In any event, the House Report stated that such a function, which is far more routine and ministerial than jury selection, should be performed only when the trial judge is "unavailable." *Id.*

Similarly, the House Report referred favorably to a statement by Chief Judge Belloni, District of Oregon, in which he discussed the various functions a magistrate in his district had performed. 1976 House Report, *supra*, at 9, 1976 U.S. Code Cong. & Admin. News at 6169, citing 1975 Senate Hearings, *supra*, at 39-40. One function the judge had mentioned was jury selection. 1975 Senate Hearings, *supra*, at 39. However, the House Report's favorable reference to Chief Judge Belloni's statement was in its discussion of *pretrial* matters. It did not make any reference to his views in its discussion of the 'additional duties" clause. 1976 House Report, *supra*, at 9. In addition, while the judge's discussion was ambiguous, he appeared to be referring to civil cases, and where "the lawyers stipulate." 1975 Senate Hearings, *supra*, at 39.

than a misdemeanor defendant makes such an intent inconceivable.[16]

C. Delegation Of Jury Selection Over A Defendant's Objection Is 'Inconsistent' With Fed. R. Crim. P. 24(a) And The Jury Selection And Service Act, Which Require The 'Court' To Preside Over Jury Selection

In *Wingo* v. *Wedding*, 418 U.S. at 468-69, 472, the Court invalidated the assignment to a magistrate of a habeas corpus hearing on the additional ground that such an assignment was "inconsistent," under the "additional duties" clause, with the Habeas Corpus Act, which required such hearings to be conducted by "[t]he court, or justice, or judge." *Id.* at 466-67, citing Rev. Stat. § 761, 28 U.S.C. § 461 (1940 ed.) Delegation of jury selection to a magistrate is similarly "inconsistent" with federal rules and statutes that assign exclusive authority to the "court" to preside over jury selection. Therefore, the district court below had no authority under § 636(b)(3) to assign jury selection to a magistrate.

Fed. R. Crim. P. 24(a), reproduced at Pet. A. 4, authorizes the examination and challenge of jurors in the presence of the "court." The Supreme Court promulgated this rule in 1944.[17] The Federal Rules of Criminal Procedure have the effect of law. *Marion* v. *United States*, 404 U.S. 307, 319 (1971) (dictum); *United States* v. *Hvass*, 355 U.S. 570, 575 (1958) ("[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes [federal rules]"); 18 U.S.C. § 3771 (1982).

[16] While the 1979 amendment empowered magistrates to conduct jury trials in misdemeanor cases with the parties' consent, this does not reflect upon the drafters' intent in 1976, which was the sole basis for the court of appeals' expansive construction of § 636(b)(3).

[17] Order of December 26, 1944 (eff. March 21, 1946), pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688, 18 U.S.C. § 686 (current version at 18 U.S.C. § 3771 (1982)).

The rule's use of "court" clearly refers to district judges. The position of magistrate did not exist when this rule was promulgated. No rule or practice allowed commissioners to preside at jury selection. *See generally Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931). None of the Court's precedents contemplated anyone other than the district judge presiding during *voir dire*. *See, e.g., Connors* v. *United States*, 158 U.S. 408, 413 (1895) (*voir dire* "inquiry is conducted under the supervision of the *court* . . . [and] must, of necessity, be left to its sound discretion) (emphasis added); *see supra* at 15-16.

Fed. R. Crim. P. 1 ("Scope"), reproduced at Pet. A. 4, states that the rules apply to "all criminal proceedings in the *courts* of the United States" (emphasis added), but only apply to *magistrates* when "specifically provided in one of the rules." Rule 24(a) does not so provide. The same distinction is made in Rule 54, reproduced at Pet. A. 4, which does not include "magistrate" within its definition of "district court." The 1972 Advisory Committee Notes to Rule 54 explain that "Judge of the United States . . . is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." 18 U.S.C.A. Rule 54 (West 1976) at 626. *Compare* Fed. R. Evid. 1101 ("[t]he terms 'judge' and 'court' *in these rules* include . . . United States magistrates") (emphasis added).

Meanwhile, the Jury Selection and Service Act of 1968, adopted shortly before the Magistrates Act by the same Congress, defines "court" as "courts constituted under chapter 5 of title 28 . . ." Pub. L. No. 90-274, § 101, 82 Stat. 61 (March 27, 1968) (current version at 28 U.S.C. § 1869(f)(1982)). Tit. 28, Chapt. 5, § 132(b), in turn states:

> § 132. *Creation and composition of district courts*
>
> * * *
>
> (b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court. . . .

The Jury Selection and Service Act permits a criminal defendant to challenge the selection of the petit jury before the

voir dire examination, or within seven days after the defendant discovers appropriate grounds—in the "court." 28 U.S.C. § 1867(a). It does not permit such a challenge to be made to a magistrate. *See also* 28 U.S.C. § 451 (defining "court of the United States" to include only Art. III, life-tenured judges).

While the 1976 amendments to the Magistrates Act were intended in part to "overrule" *Wingo* v. *Wedding* by explicitly authorizing magistrates to conduct habeas corpus hearings "[n]otwithstanding any provision of law to the contrary," *see* § 636(b)(1), Congress omitted such language in § 636(b)(3), instead retaining the "not inconsistent with" jurisdictional limitation. In 1979, Congress enhanced the magistrates' new consent civil trial jurisdiction with an identical "notwithstanding" clause, but left § 636(b)(3) alone. Thus, a law's use of "court" or "judge" does not preclude a magistrate from handling the broad range of duties authorized by § 636(b)(1) or (c), but it does preclude an inconsistent delegation under the "additional duties" subsection. Since the assignment of jury selection to a magistrate in this case was "inconsistent" with the above "laws of the United States," it exceeded the scope of § 636(b)(3).

D. The Statute Should Be Construed To Avoid Serious Constitutional Doubts

Federal statutes should be construed so as to "avoid serious doubt of their constitutionality." *Schor*, 478 U.S. at 841, *quoting Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *Crowell* v. *Benson*, 285 U.S. at 62. Where serious doubts are present, "a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." *Schor, supra*, quoting *Crowell* v. *Benson, supra*. On the other hand, a court may not "ignore the legislative will in order to avoid constitutional adjudication . . ." *Schor, supra*.

As we discuss in Points II and III, *infra*, and as Congress surely believed, delegation of felony jury selection to a magistrate over objection raises serious constitutional questions. *United States* v. *Ford*, 824 F.2d at 1436-37. Surely it is "fairly possible" to construe this statute to avoid these doubts. As

demonstrated above, the court of appeals' construction is compelled by neither the Act's language nor its history. The remainder of the statutory scheme would be unaffected. Meanwhile, the Court would avoid stepping onto the "slippery slope" of determining which, if any, trial functions may be delegated under the statute and the Constitution.

In applying this principle, the Court need have no apprehension that it would thwart the legislative intent. Prior to adopting the legislation in 1968, Congress itself repeatedly stressed an overriding purpose to avoid creating constitutional conflict. *See generally TPO, Inc.* v. *McMillen*, 460 F.2d 348, 352-54 (7th Cir. 1972) (Congress required consent before magistrates could exercise any trial jurisdiction to avoid constitutional conflict); discussion *supra* at 14-15. Congress' similar wariness during 1976 and 1979 was reflected in its continuation of the consent requirement in petty offense cases and its extension of it to civil trials.[18]. The "additional duties" section itself precludes assignment of duties "inconsistent with the Constitution." § 636(b)(3).

E. Because The Jury That Convicted Petitioners Was Selected By A Magistrate Who Had No Statutory Authority To Do So, The Convictions Must Be Reversed

The jury that convicted petitioners was selected by a judicial officer not empowered by Congress to do so, and therefore lacking jurisdiction to act. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245, (1845) (Congress possesses "the sole power of creating the tribunals . . . and of investing them with jurisdiction"); 18 U.S.C. § 3231 (1982). Petitioners objected to this procedure on precisely this ground. This was no trivial defect: jury selection is critical to a criminal defendant's constitutional right to trial by an impartial jury. *See* Points II and III, *infra*. Congress was careful to limit the jurisdiction of magistrates precisely because it did not want district courts to assign functions that, for reasons of constitutional requirements or essential fairness, must be conducted by an Art. III court.

In *Wingo* v. *Wedding*, 418 U.S. at 467, the Court upheld the reversal of a district court judgment denying a defendant's habeas corpus petition, without any analysis of the underlying evidence or "harmless error," because the magistrate had no statutory authority to conduct the hearing. The same reasoning applies here. *See United States* v. *Trice*, 864 F.2d 1421 (criminal conviction reversed where magistrate presided at jury selection subject to *de novo* review).[19]

---

[18] Judge Charles Metzner, representing the Judicial Conference, explained that proposed § 636(b)(1)(B), which Congress adopted, would permit magistrates only to "recommend," not "determine," pretrial matters "to avoid . . . possible constitutional objection . . ., [a]lthough there is respectable authority that finds congressional power sufficient to avoid any constitutional objection . . ." 1975 Senate Hearings, *supra*, at 6 (emphasis added). In 1979, Congress retained the consent requirement for trials of "petty offenses" even though it apparently believed consent was *not* constitutionally required. S. Rep. No. 74, 99th Cong., 1st Sess. 6 (1979).

[19] *See also Hall* v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987) (judgment reversed where magistrate lacked statutory authority to conduct civil trial); *Wimmer* v. *Cook*, 774 F.2d 68 (4th Cir. 1985) (same); *United States* v. *Curry*, 767 F.2d 328 (7th Cir. 1985) (judgment revoking defendant's probation reversed where magistrate lacked statutory authority to hold hearing); *Banks* v. *United States*, 614 F.2d 95 (6th Cir. 1980) (same). While *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 139 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 875 (1989), held that the magistrate's selection of the jury was harmless absent a specific claim of prejudice, the decision does not indicate whether the defendants there, like here, had objected in the district court. Moreover, as we discuss *infra* at 45-46, *Chapman* v. *California*, 386 U.S. 18 (1967), does not apply to this type of error going to the authority of the tribunal to act or to the inherent impartiality of the jury selection process.

II. ART. III DOES NOT PERMIT A MAGISTRATE TO CONDUCT JURY SELECTION IN A FELONY TRIAL OVER THE DEFENDANT'S OBJECTION

A. Petitioners Had A Personal Right Under Art. III Of The Constitution To The Presence Of The District Judge During The Jury Selection Phase Of The Trial

1. The Right To 'Trial By Jury' Under Art. III And The Sixth Amendment Includes A Right To Trial Before An Art. III Judge

Art. III of the Constitution, reproduced at Pet. A. 1, mandates that judges exercising the "judicial Power of the United States . . . shall hold their Offices during good Behavior" and receive "Compensation which shall not be diminished during their Continuance in Office." §1. This "judicial Power shall extend to all Cases . . . arising under this Constitution [and] the Law of the United States . . ." §2. Finally, Art. III requires that "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." §2, ¶3.

In *Schor*, the Court recognized that Art. III confers upon a litigant a "*personal right*" to "an impartial and independent federal adjudication of claims within the judicial power of the United States." 478 U.S. at 848 (emphasis added). *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) ("basic constitutional protections designed in part for the benefit of litigants"); *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) (Art. III entitles ex-serviceman to the "safeguards afforded those tried in the regular courts"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922) (persons invoking a constitutional benefit of citizenry "are entitled to a judicial determination of their claims"); *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537, 541 (9th Cir.) (*en banc*) (opinion by now-Justice Kennedy) ("personal right . . . to demand Article III adjudication of a civil suit") ("*Pacemaker*"), *cert. denied*, 469 U.S. 824 (1984). This right presumes the presence of an Art. III judicial officer: a judge whose ability to be "impartial and independent" is secured by lifetime tenure and an irreducible salary. *Northern Pipeline Construction Co.* v. *Marathon*

Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion) ("*Northern Pipeline*"). A magistrate is not such an officer. *United States* v. *Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting).

Art. III protects the individual litigant by insulating the judicial officer exercising the judicial power from potential interference by a coordinate branch of government. *Schor*, 478 U.S. at 848; *Northern Pipeline*, 458 U.S. at 58-60. Its tenure and salary provisions also allow the judge "to guard the Constitution and the rights of individuals from . . . the people themselves." Federalist No. 78 (Hamilton) (New American Library ed. 1961). "Article III's salary and tenure provisions promote impartial adjudication by placing the judicial power of the United States 'in a body of judges insulated from majoritarian pressures and thus able to enforce [federal law] without fear of reprisal or pubic rebuke.' *United States* v. *Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting)." *Schor*, 478 U.S. at 860 (Brennan, J., dissenting). *See Pacemaker*, 725 F.2d at 548 (dissenting opinion) ("protection of minorities from the tyranny of the majority," citing 2 J. Story, *Commentaries on the Constitution of the United States* 403 [1973]).

"The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well . . ." *Northern Pipeline*, 458 U.S. at 59 n.10 (plurality opinion). *See Chandler* v. *Judicial Council*, 398 U.S. 74, 84 (1970) (independence from other judges required in "any phase of the decisional function"); *id.* at 136 (Douglas, J., dissenting); *Hastings* v. *Judicial Conference of the United States*, 770 F.2d 1093, 1106-07 (D.C. Cir. 1985) (Edwards, J., concurring) ("the guarantee of independence runs to individual judges as well as to the judicial branch"); *Pacemaker*, 725 F.2d at 549 (dissenting opinion) ("servants . . . only of their consciences . . ." [citation omitted]); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979).

Despite Art. III's insulation of judicial officers from all sources of extraneous pressure through salary and tenure protections, "Article III does not confer on litigants an absolute

right to the plenary consideration of *every* nature of claim by an Article III court." *Schor*, 478 U.S. at 848 (emphasis added). But this statement implies that, depending upon the "nature of claim," a litigant's *right* to "plenary consideration . . . by an Article III court" may be "absolute." *See, e.g., Schor*, 478 U.S. at 853 (where the "nature of the claim" is at the "core" of traditional Art. III judicial power, the Court's examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching"); *Northern Pipeline*, 458 U.S. at 82-83 (where "*constitutional* rights" are being adjudicated, the Court's scrutiny is "far stricter" [emphasis in original]); *Crowell* v. *Benson*, 285 U.S. at 60-61 (judicial power "necessarily extends" to enforce "constitutional rights").

That a personal Art. III right may be absolute is also suggested by *Schor's* recognition that the presence of consent may be "a significant factor" in determining whether an individual's Art. III rights have been violated. *Schor*, 478 U.S. at 849, citing *Northern Pipeline*, *supra*. *Schor* equated consent in such a context to waivers of "other personal constitutional rights that dictate the procedures by which civil and criminal matters *must* be tried." *Schor*, *supra* (emphasis added), citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (right to trial); *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968) (trial by jury in criminal cases); Fed. R. Civ. P. 38(d) (trial by jury in civil cases). Each of these rights, absent waiver, is similarly absolute.[20]

---

[20] Where an individual, unlike here, has knowingly and voluntarily waived his personal Art. III rights, his sole hope for relief on appeal is to invoke the interests of the Judicial Branch in resisting encroachment upon its independence and powers by the Executive and Legislative Branches. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850-851 (1986). The test *Schor* applied in such a case, where the individual invoked the Judiciary's interests on his own behalf, was a relative one, weighing Congress' constitutional and practical interests in the legislative scheme against the encroachment upon the Judiciary's exercise of traditional Art. III power. This latter analysis presumably does not apply where the individual has *not* consented, but instead invokes his personal Art. III rights. If the same, less rigorous balancing test applied in both contexts, then, as the *Schor* dissent argued, the Court's construction of two distinct analytic frameworks to resolve Art. III claims would make no sense. *See, e.g., Schor*, 478 U.S. at 807 (Brennan, J., dissenting).

The individual's interest in an adjudication by an impartial, fully independent Art. III tribunal is greatest in criminal cases. "There is no doubt" that the Framers envisioned "all criminal matters, with the narrow exception of military crimes," to be at the "protected core" of Art. III. *Northern Pipeline*, 458 U.S. at 70 n.25 (plurality opinion); *see Schor*, 478 U.S. at 853 (the "core" or "ordinary powers of district courts" include "presid[ing] over jury trials or issu[ing] writs of habeas corpus"). Nevertheless, the Framers directly guaranteed in Art. III the right to trial by jury only in *criminal* cases. Hamilton explained:

> . . . I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question.

Federalist No. 83, *supra*, at 499. *See id.* at 508 ("the security of liberty is materially concerned only in the trial by jury in criminal cases").

But even "criminal matters" contain a scale of procedural values, as the Court implicitly recognized in distinguishing between suppression hearings and criminal trials in *United States* v. *Raddatz*, 447 U.S. at 678-79. And at the very pinnacle of the criminal scale is the felony jury trial. "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984).

The right of trial by jury is the most "priceless" safeguard of individual liberty, *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961), protecting the accused against "the arbitrary exercise of power by prosecutor or judge." *Batson* v. *Kentucky*, 476 U.S. 79, 86 (1986). The right is "so important to liberty of the individual that it appears in two parts of the Constitution," Art. III itself and the Sixth Amendment. *United States ex rel. Toth* v. *Quarles*, 350 U.S. at 16. Surely, as the history and practice in our federal courts establish, *see supra* at 15-16, 22-25, and Congress has explicitly acknowledged, *see* 18 U.S.C. § 3401, an individual felony defendant has an absolute right to trial by jury in the district court.

This right presumes the personal presence of an Art. III district judge.

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an *officer* vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a *trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them* on the law and to advice them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. *Hof*, 174 U.S. 1, 13-14 (1899) (emphasis added). In the federal courts, too, jury trials "are under the *constant* superintendence of the trial judge . . . [who is] 'not a mere moderator' but 'is the governor of the trial' . . ." *Crowell* v. *Benson*, 285 U.S. at 61 (emphasis added). Thus, the Federal Rules of Criminal Procedure assign personal direction of every phase of a criminal trial to the "court." *See* Fed. R. Crim. P. 23-31, 33. As noted above, Congress itself codified the "right" of litigants to the personal presence of a district judge. 28 U.S.C. § 636(a)(3), (c); 18 U.S.C. § 3401.

2. The Trial Court's Role During Jury Selection Is So Crucial That No Distinction Under Art. III Can Be Drawn Between Jury Selection And The Evidence Phase Of The Trial

If a federal felony defendant has an absolute, personal right to a trial by jury before an Art. III judge, then surely this right encompasses jury selection. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion). The right to an impartial jury assures a defendant that he will not be deprived of his life or liberty by a jury predisposed to do so, *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980); it is "an indispensable element of a fair criminal trial." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 196 (1981) (Stevens, J., dissenting). The court's discretionary determinations during the jury selection process are as significant as its decisions during the subsequent evidence phase to the defendant's ability to obtain an impartial, independent adjudication. Meanwhile, these determinations are less susceptible to review.

Prior to the statute's enactment in 1968 and amendment in 1976, judicial precedent, rules and practice all required federal judges to personally oversee jury selection in criminal trials. *See supra* at 15-16 and 22-25. Subsequently, the Court held that the public's right to open trial proceedings under the First Amendment included *voir dire*, tracing the historical presence of the trial judge during that stage as far back as the Sixteenth Century. *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 507. In *Batson* v. *Kentucky*, *supra*, and other decisions safeguarding the criminal defendant's right to the unbiased selection of an impartial jury, the Court has continued to presume that jury selection is part of trial and that the *trial* judge or court must be present and actively involved. *See Batson*, 476 U.S. at 122 (*voir dire* part of the "trial phase of our adversary system of justice") (Burger, C.J., dissenting). The lower courts, meanwhile, have all interpreted "trial" under the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, to begin with jury selection.

United States v. *AAA Electrical Co.*, 788 F.2d 242, 246 (4th Cir. 1986) (and cases cited therein).[21]

The fundamental importance of *voir dire* is summarized in *Rosales-Lopez* v. *United States*, 451 U.S. at 188:

> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See *Connors* v. *United States*, 158 U.S. 408, 413 (1895). Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts. [footnote omitted]

During *voir dire*, the trial judge must determine whether a prospective juror is biased due to: racial prejudice, *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Aldridge* v. *United States*, 283 U.S. 308 (1931); ethnic prejudice, *Rosales-Lopez* v. *United States*, *supra;* prior knowledge about the case, *Patton* v. *Yount*, 467 U.S. 1025, 1036-40 (1984); *Irvin* v. *Dowd*, 366 U.S. 717, 727-28 (1961); or other reason, *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512 (prior victimization by crime). He must determine the appropriate questions for the court or counsel[22] to ask to uncover such bias. *See generally*

---

[21] The Court's double jeopardy cases are not to the contrary. They fix the point—the swearing of the jury—at which the trial may not be "discontinued" without implicating a defendant's double jeopardy rights. They do not define jury selection as "pretrial." *See Crist* v. *Bretz*, 437 U.S. 28, 35-36 (1978); *Downum* v. *United States*, 372 U.S. 734, 737 (1963); *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949).

[22] Under Fed. R. Crim. P. 24(a), a federal court may permit the opposing counsel to personally address questions to the prospective jurors. The judge must then be additionally attentive to "control that process to make sure privileges are not . . . abused." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 n.9 (1984). *See, e.g., Thompson* v. *Lynaugh*, 821 F.2d 1054, 1061 (5th Cir.) (prosecutor incorrectly explained law to jurors), *cert. denied*, ___ U.S. ___, 108 S.Ct. 5 (1987).

Ham v. *South Carolina*, *supra*. He must ascertain each juror's ability to understand and apply essential legal principles. *Wainwright* v. *Witt*, 469 U.S. 412, 425-26 (1985). He must strike the appropriate balance between the constitutional presumption favoring a public trial, *see Waller* v. *Georgia*, 467 U.S. 39, 44 (1984); the defendant's right to an impartial jury; and each prospective juror's "significant interest in privacy." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512-13.

While these functions require the trial judge to focus upon individual jurors, he also must be ever-mindful of the impartiality and qualifications of the prospective jurors as a group. *See, e.g., Batson* v. *Kentucky, supra* (evaluation of prosecutor's alleged pattern of racially-motivated challenges); *Irvin* v. *Dowd, supra* (entire *venire* tainted by pretrial publicity). In performing this function, he may have to evaluate whether to apply a controversial or expensive remedy, such as outright dismissal, change of venue, sequestration of jurors, closure of the entire proceeding, or postponement of the trial. *See, e.g., Batson* v. *Kentucky, supra; Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512-13; *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 563-64 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333, 342 (1966).

In each of these areas, the Court has stressed the broad discretion that must be afforded the trial judge. "This is so because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)." *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976). The judge "must rely largely on his immediate perceptions," *Rosales-Lopez* v. *United States*, 451 U.S. at 189; the juror's "'manner . . . is oftentimes more indicative of the real character of his opinion than his words.'" *Patton* v. *Yount*, 467 U.S. at 1037-38 n.12. Indeed, the Court has equated the trial judge's factfinding role during jury selection with the jury's factfinding role during trial, noting further: "In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses." *Rosales-Lopez*, 451 U.S. at 188.

The Court's landmark decision in *Batson* v. *Kentucky* added further to the trial court's indispensable role. *Batson* requires a judge to first evaluate a prosecutor's alleged racially-discriminary exercise of peremptory challenges by examining any "pattern" of strikes as well as the "prosecutor's questions and statements during *voir dire*." 476 U.S. at 96. If the court finds a prima facie case, it must then subjectively evaluate the credibility of the prosecutor's "neutral explanation." *Id.* at 97. The Court made "no attempt to instruct [state and federal] courts how best to implement [its] holding," *id.* at 99, but instead noted its "confidence that trial judges, experienced in supervising *voir dire*," would make sound judgments, *id.*, to which reviewing courts would be required to give "great deference," *id.* at 98 n.21. The decision thus imposed a "continuing monitoring and recording" requirement "sure to tax even the most capable . . . judges," *id.* at 103 (Burger, C.J., dissenting), while ensuring future litigation to "spell out its contours." *Id.* at 102 (White, J., concurring). In fact, considerable litigation has ensued, characterized by appellate deference to the subjective, discretionary determinations of judges actually present during *voir dire*.[23]

Jury selection is indistinguishable from the balance of the trial for Art. III purposes not only because selection of an impartial jury is essential to a fair trial, but also because the

---

[23] Since *Batson*, appellate courts have remanded claims of error for additional factfinding by the trial court in view of the latter's unique position to make largely subjective evaluations of the prosecutor's intent. *United States* v. *Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part*, 836 F.2d 1312, *cert. denied*, ___ U.S. ___, 109 S.Ct. 28 (1988); *United States* v. *Wilson*, 816 F.2d 421 (8th Cir. 1987); *United States* v. *Allen*, 814 F.2d 977, 978 (4th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 371 (1988), and have otherwise employed a highly deferential standard of review. *See, e.g., United States* v. *David*, 844 F.2d 767, 769 (11th Cir. 1988); *United States* v. *Cloyd*, 819 F.2d 836, 837-38 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2910 (1988); *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *United States* v. *Woods*, 812 F.2d 1483 (4th Cir. 1987).

trial judge's conduct of the subsequent trial proceedings depends upon his personal knowledge of what occurred during *voir dire*. Evaluation of subsequent taint or misconduct allegations requires the trial judge to consider a juror's behavior and personality as revealed during *voir dire*, as well as the candor of his *voir dire* disclosures.[24] In preparing his charge, in ruling upon a defendant's objection that other-crime, impeachment or co-conspirator hearsay evidence would unfairly prejudice, confuse or mislead the jury, Fed. R. Evid. 403, 404(b), 608(b), 609, in weighing the need for and effectiveness of remedial measures such as limiting instructions, Fed. R. Evid. 105, or a mistrial, Fed. R. Crim. P. 14, the trial judge must rely upon his knowledge of the jurors' intellectual and emotional functioning. His absence during jury selection may affect his control of the trial, and "is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself." *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting).

The number, complexity, and importance of the decisions that must be made by the judge presiding over jury selection demonstrate that the security provided by Art. III's lifetime

---

[24] In *United States* v. *Hernandez*, 862 F.2d 17 (2d Cir. 1988), the convictions were reversed where the trial court had disqualified the sole juror holding out for acquittal, after four days of deliberations, for nondisclosure of his psychiatric history during *voir dire* and "mental incompetence." In concluding that the district judge should have removed the juror, if at all, earlier in the proceedings before his status as the lone holdout for acquittal emerged, the court of appeals noted that the juror had acted strangely, "winking, smiling and nodding his head at the defendants," during the *voir dire*. *Id.* at 19. *See Smith* v. *Phillips*, 455 U.S. 209, 212 n.4 (1982) (nondisclosure of juror's midtrial employment application to prosecutor's office did not require new trial where trial court had relied upon that juror's detailed *voir dire* disclosure of his general law enforcement background and interest); *see generally Remmer* v. *United States*, 350 U.S 377 (1956) (juror tampering).

tenure and irreducible salary provisions is at least as essential during this stage as during the rest of the trial. In a *Batson*, challenge, the court must determine whether the Executive Branch, through the actions of the prosecutor, is discriminating according to race; sustaining such a grave charge is no easy matter. Less dramatic, but equally subtle decisions concerning an individual juror's fitness to serve can also be influenced by the presiding officer's awareness that the community is "yearning . . . for retribution," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980), inflamed against a particular defendant or category of crime, *see Wainwright* v. *Witt*, 469 U.S. at 459 (Brennan, J., dissenting), or that the Justice Department is keenly interested in the outcome of the case. If a district judge could assign such critical trial functions to a magistrate despite the inherent insecurity under Art. III of the latter's position, then logically the judge could assign subsequent trial functions as well. This could not have been the Framers' intention under Art. III.[25]

3. The Criminal Defendant's Compelling Interest In Jury Selection By An Art. III Judge Far Outweighs Congress' Minimal Interest In Authorizing Assignment Of This Function To Magistrates

Even if a criminal defendant's personal right under Art. III to have a district judge preside during jury selection is not

[25] The wholesale assignment of criminal trial functions as important as jury selection would seriously weaken the institutional independence of the judiciary in relation to the other branches, thereby reducing the ability of individual litigants to obtain independent decisionmaking. By investing public resources in a magistrate system rather than authorizing additional judgeships, Congress forces overworked Art. III judges to increasingly rely on magistrates to perform traditional adjudicatory functions. The Judicial Conference's inevitable response—creation of additional magistrate positions—in turn "reduces the pressure on Congress to create more Article III judgeships, and increases the pressure on district courts to escalate the use of magistrates." *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d at 549 (dissenting opinion).

absolute, it far outweighs Congress' interest in authorizing delegation of such a procedure to magistrates. In *Northern Pipeline, supra*, the Court observed that Congress had a "minimal" interest in assigning the adjudication of traditional "common law" rights to a "non-Art. III 'adjunct'" and that, where constitutional rights as opposed to "rights created by Congress" are concerned, the Court's scrutiny must be "far stricter." 458 U.S. at 83-84, comparing *United States* v. *Raddatz, supra* (strict scrutiny of delegation to magistrates of authority to conduct pretrial suppression hearings) with *Crowell* v. *Benson, supra* (adjudication of "public rights"). *Northern Pipeline* disallowed delegation of common law claims to non-Art. III bankruptcy courts even though Congress had established these courts pursuant to its Art. I authority to create uniform national laws over bankruptcies. *Cf. Palmore* v. *United States*, 411 U.S. 389 (1973) (upholding Congress' exercise of its unique, Art. I power to establish local, non-Art. III criminal courts in the District of Columbia).[26] In this case, involving adjudication of constitutional rights of the highest order, Congress' interest is far less than in *Northern Pipeline*.

Congress' practical stake in the assignment of felony jury selection to magistrates is no greater than its constitutional interest. Congress did not consider such delegation significant

[26] *Palmore* v. *United States*, 411 U.S. 389 (1973), held that, pursuant to Congress' "plenary Art. I power to legislate for the District of Columbia," Congress could create a local, non-Art. III court to try local cases in the District. *Id.* at 407. While acknowledging that Art. III's requirements "are applicable where laws of national applicability and affairs of national concern are at stake," the Court reasoned that this interest may have to give way in those few instances where Congress has plenary power to legislate "in specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408. *See Northern Pipeline*, 458 U.S. at 75-76 (narrowly construing *Palmore*). The prosecution here of federal narcotics laws of "national applicability," against which petitioners were entitled to assert their full panoply of federal procedural rights, obviously presents an entirely different case.

enough to mention anywhere in the otherwise comprehensive statutory scheme. The procedure does not further Congress' overriding purpose to free overworked district judges to perform their "traditional adjudicatory duties," since jury selection itself is such a duty. In the majority of cases, federal jury selection takes less than two hours.[27] The minimal, initial savings of the judge's time that such an assignment might achieve would frequently be offset by cumbersome review procedures. *See infra* at 43-45. Perhaps recognizing the lack of utilitarian benefit in (and the inappropriateness of) this process, the district courts have employed it sparingly: only 55 such assignments were made during the six-month period between July 1 and December 31, 1988, the first period such statistics were maintained.[28] By comparison, during the year ending June 30, 1987, magistrates disposed of a total of 466,078 cases and other matters, including 321,029 "additional duties."[29]

The curtailment of this procedure would not interfere in any respect with the magistrates' performance of their other duties under the Act. At the same time, it would avoid spawning an unnecessary, new field of appellate litigation.

B. Delegation Of Felony Jury Selection Violates Art. III Because the Magistrate's Decisionmaking Is Essentially Unreviewable, Regardless Of The District Court's Offer Of 'De Novo' Review

In *Northern Pipeline*, because the non-Art. III bankruptcy courts had "all ordinary powers of district courts," and its

---

[27] G. Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* 13 (Federal Judicial Center 1977). Of the judges surveyed, 65 percent estimated that *voir dire* is usually completed within one hour; 28 percent estimated that the usual duration is one to two hours (in criminal cases).

[28] Letter dated February 16, 1989, from the Administrative Office of the United States Courts, Magistrates Division, to counsel for petitioners, lodged with the Clerk.

[29] Administrative Office of the United States Courts, Annual Report of the Director 34 (1987).

judgments were subject to review only by a deferential, "clearly erroneous" standard, the Court rejected an "adjunct" rationale for upholding the Act. 458 U.S. at 85. On the other hand, in *Raddatz*, the "critical" basis for the Court's decision to uphold the statutory scheme—despite the "stricter scrutiny" required for constitutional adjudication—was that "'[t]he authority—and the responsibility—to make an informed, final determination . . . remain[ed] with the judge,' 447 U.S. at 682, quoting *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976) . . . ." *Northern Pipeline*, 458 U.S. at 81. In this case, the scrutiny of the district court's review procedure must be even greater than in *Raddatz* because "the criminal law objective of determining guilt or innocence," rather than the defendant's "lesser" interest in a pretrial suppression motion, is involved. *Raddatz*, 447 U.S. at 678-79. Because the district court cannot make an "informed, final determination" when jury selection is conducted by a magistrate, such an arrangement violates Art. III.

The careful statutory scheme that *Raddatz* upheld required the magistrate to provide the district court with specific, proposed findings of fact and conclusions of law. 28 U.S.C. § 636(b)(1). Together with the hearing transcript, these enabled the district judge to independently determine, through a *de novo* review, whether to adopt the magistrate's additional recommendation for the ultimate resolution of the defendant's motion. Following jury selection, however, a magistrate presents the court with a "final determination": a panel of jurors ready to be sworn. The statute prescribes no procedure for or standard of review: no factual or legal findings, no report, not even a transcript.[30]

No reviewing court can properly second-guess the inherently subjective, discretionary, quasi-factual judgments of the

---

[30] The local rule cited by the court of appeals was no more specific: it merely authorizes magistrates to exercise whatever jurisdiction is assigned to them under 28 U.S.C. § 636. *United States* v. *Garcia*, 848 F.2d at 1327, J.A. 25, citing E.D.N.Y. Magistrates R. 1, reproduced at Pet. A. 5. The local rules do not mention jury selection, let alone a procedure or standard for review.

voir dire court. *See supra* at 35-40. Thus, an "appeal" *to* a district judge would be no more effective than an appeal *from* a district judge to a court of appeal. Questioning of each juror during *voir dire* is far briefer and more superficial than of a hearing witness, providing the reviewing court comparatively little to review even where, unlike here, a transcript is available. The judge cannot effectively requestion a juror; the initial, relatively spontaneous *voir dire* questioning can never be recreated. *United States* v. *Ford*, 824 F.2d at 1437 ("a delicate exercise at best"); *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting) (juror will become defensive); *see, e.g.*, *Patton* v. *Yount*, 467 U.S. at 1039 ("unlike witnesses, prospective jurors have had no briefing by lawyers . . . [and] cannot be expected invariably to express themselves carefully or even consistently").

Moreover, *de novo* review of challenges for cause cannot generally occur because any juror subject to a magistrate's cause determination will have been excused. A defendant will almost invariably exercise a peremptory challenge where the magistrate has denied his cause challenge. Similarly, an erroneous ruling *granting* a prosecutor's cause challenge will permanently deprive the defendant of a potentially favorable juror, while also saving the prosecutor a peremptory challenge.

A court's efforts to correct a magistrate's erroneous ruling would only accentuate the "essentially clerical" view of *voir dire* suggested by the court's original assignment of it to a subordinate judicial officer. *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting). This message would be conveyed if the court excused any previously-chosen juror and initiated a new *voir dire* with replacement jurors, requestioned the original jurors, or gave corrected legal instructions. Such repetition of the magistrate's role would also thwart the sole justification for the initial assignment: saving the district judge time for "more important" tasks.

Even if the judge here had offered a more thorough review procedure, *see supra* at 3, he still would have had no choice but to apply an impermissibly deferential "clearly erroneous or

contrary to law" standard. The inherent unreviewability of the magistrate's subjective decisionmaking during *voir dire* requires the district court to accept his credibility determinations. Thus, the only claimed mistake the court can possibly overturn must be clearly apparent and involve legal error. In this sense, the magistrate's powerful role is similar to that which he performs under § 636(b)(1)(A) in deciding non-dispositive, pretrial motions. It was just this type of deferential review that the Court termed an inadequate "facade" in *Northern Pipeline*. 458 U.S. at 85-86. *See also United States* v. *Raddatz*, 447 U.S. at 711-13 (Marshall, J., dissenting). The magistrate's selection of the jury is inherently unreviewable and, therefore, impermissibly "final" under Art. III.

C. The Denial Of Petitioner's Art. III Right To The Presence Of A District Judge During Jury Selection Requires That The Judgment Be Vacated

"Harmless error" analysis would be even less appropriate if the Court found a constitutional violation in addition to a statutory one. *See supra* at pp. 28-29. Under *Chapman* v. *California*, 386 U.S. 18 (1967), "harmless error" analysis "presupposes a trial . . . before an impartial judge and jury." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986), citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (due process violated where judge with potential financial conflict of interest tried case despite possibility of "fair" trial). "'[S]ome constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman* v. *California*, 386 U.S. at 23. The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray* v. *Mississippi*, 481 U.S. at 668. Thus, the Court has consistently reversed convictions, regardless of the strength of the prosecution's case, where it found jury selection procedures in violation of due process. *See, e.g.*, *Batson* v. *Kentucky*, *supra* (prosecutor's use of peremptory challenges to exclude blacks); *Ham* v. *South Carolina*, *supra* (failure to inquire during *voir dire* concerning racial prejudice).

Similarly, where the ability to link the violation of a constitutional right to specific prejudice is not possible due to the

inherent subtlety of the potential impact, harmless error analysis has not been applied. *See, e.g., Vasquez* v. *Hillary*, 474 U.S. 254 (1986) (plurality opinion) (racial discrimination in selection of grand jury "undermines the structural integrity of the criminal tribunal itself"); *Waller* v. *Georgia*, 467 U.S. 39, 49-50 (1984) (violation of right to public trial); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (male defendant entitled to new trial due to systematic exclusion of women from state juries); *Peters* v. *Kiff*, 407 U.S. 493, 502-03 (1972) (systematic exclusion of blacks from state grand juries.)

III. ASSIGNMENT OF JURY SELECTION TO A MAGISTRATE OVER A FELONY DEFENDANT'S OBJECTION VIOLATES THE DUE PROCESS CLAUSE REGARDLESS OF THE COURT'S OFFER TO REVIEW '*DE NOVO*' THE MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE

"Due process means . . . a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). This is as true during jury selection as during the subsequent phases of the trial. *See supra at* 35-40. Art. III affords federal, but not state, defendants the additional procedural protection that the independence and impartiality of judges who exercise these functions will be enhanced by lifetime tenure and an irreducible salary. This additional constitutional protection creates a liberty interest that cannot be infringed without violating the Due Process Clause. *See generally Vitek* v. *Jones*, 445 U.S. 480, 488-89 (1980).[31]

---

[31] While Art. III does not apply to the states, the state cases seem to uniformly hold that a defendant has a right to the presence of the trial judge during jury selection, although some go on to hold that this right may be waived or that prejudice must be shown to warrant reversal. *See, e.g., Carter* v. *State*, 512 So.2d 284 (Fla. Dist. Ct. App. 1987) (conviction reversed); *Hall* v. *State*, 497 N.E.2d 916 (Ind. 1986) (same); *Peri* v. *State*, 426 So.2d 1021 (Fla. Dist. Ct. App. 1983) (same); *Bright* v. *State*, 305 S.W.2d 899 (Tex. Crim. App. 1957) (no reversal absent prejudice); *State* v. *Bolton*, 324 Ill. 322, 155 N.E. 310 (1927) (no reversal where judge's absence was temporary and he could hear proceedings from an anteroom).

Even if, contrary to our discussion in Point II, the interests underlying Art. III do not make this right absolute, petitioners' interest nevertheless was unquestionably compelling. To overcome their interest, the Due Process Clause requires that the government identify weightier, countervailing public or institutional concerns within the framework of the three-part due process analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The components of this analysis are:

> (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve.

Raddatz, 447 U.S. at 677, citing *Mathews* v. *Eldridge*, *supra*.[32]

A criminal defendant's "private interest" in his liberty "is almost uniquely compelling." *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985). The importance under Art. III of having a district judge present during jury selection to safeguard this liberty interest has been fully discussed. *See* Point II, *supra*, at 35-40.

The "risk of an erroneous determination by reason of the process accorded"—the substitution of a magistrate for a judge—is implicit in Art. III. The Framers required that judicial officers exercising the federal judicial power enjoy lifetime tenure and an irreducible salary because otherwise such

---

[32] A criminal trial, as opposed to a pretrial suppression hearing, as *Raddatz* itself stressed, involves a far more significant determination of guilt or innocence, and therefore, as discussed in Point II, is at the heart of Art. III. It is questionable whether *Mathews* v. *Eldridge*, which involved a litigant's property as opposed to a liberty interest, should be applied in analyzing the due process required during a criminal trial itself. *See, e.g., Lassiter* v. *Department of Social Services*, 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting) (questioning applicability of *Mathews* v. *Eldridge* where mother's liberty interest in parental rights is at stake). Nevertheless, the Court's decisions involving liberty interests have applied it. *See, e.g., Ake* v. *Oklahoma*, 470 U.S. 68, 77-78 (1985) (states required to provide defendants with psychiatric assistance on insanity issue).

officers would be influenced by the insecurity of their position. But this proposition is impossible to demonstrate in any specific case. To require such proof as a prerequisite for the application of Art. III would read this fundamental protection out of the Constitution. Rather than impose such an impossible burden upon federal litigants, Art. III *presumes* such a connection. This presumption is no less significant during jury selection than during the balance of the trial. *See supra* at 39-40.

The court of appeals did not take issue with the fundamental principle that Art. III requires the decisionmaking power, particularly in a criminal case, to be retained by an inherently-independent Art. III judge. Instead, the court reasoned that the availability of *de novo* review was sufficient to guard against error. But as we also have demonstrated, the magistrate's quasi-factual, subjective, inherently discretionary role during jury selection deprives a reviewing court of any practical ability to detect or to correct error. The absence of any review procedure pursuant to statute or even local rule, as well as the practical necessity for the court to defer to the magistrate's credibility determinations, means that "review" cannot be "*de novo*," but, in reality, must be by an impermissibly deferential, "clearly erroneous or contrary to law" standard.

In this case, the district court's offer of "review" was too little and too late. *See supra* at 3. Petitioners were given no advance notice of the specific areas of error the court would review, or the manner of such review; the court then limited its review to unsuccessful defense challenges for cause, of which there were none. The court communicated no willingness to review the *voir dire* transcript, nor did the court obtain it. The judge did not make himself available during or immediately after the *voir dire* to consider objections while the subtleties of the process were still fresh in the participants' minds; rather, he made himself available eight days later, immediately before opening statements, when no replacement jurors were available. Despite the fundamental importance of *voir dire* to petitioners' ability to obtain a fair trial, the district court trivialized the process.

Additionally, regardless of the necessity for or effectiveness of review in this case, due process requires that the trial judge be present during jury selection because of the intimate relationship between that event and the subsequent phases of the trial. As discussed more fully *supra* at 38-39, the trial judge's absence detracts from his ability to gain the jury's respect and trust, to prepare an effective charge, to rule on juror misconduct or mistrial motions, and to make discretionary evidentiary rulings dependent upon his evaluation of the likely prejudicial effect of evidence upon the jury. It also demeans the process, reducing its significance in the jurors' eyes.

As for the governmental and public interests involved, whatever limited economic interest the government has in preserving this infrequently-used procedure, *see supra* at 40-42, the government's countervailing interest in the actuality and public appearance of the "fair and accurate adjudication of criminal cases" is far greater. *Ake* v. *Oklahoma*, 470 U.S. at 79. The public's interest in the conduct of criminal proceedings surely exceeds its interest in any other function of the judicial system. The assignment of felony jury selection to a lesser officer can only diminish the public's confidence in the system's commitment to provide impartial criminal justice. *United States* v. *Trice*, 864 F.2d at ____, slip op. at 13, citing *Batson* v. *Kentucky*, 476 U.S. at 87.

Petitioners seek no new procedural right for criminal defendants. They merely seek to safeguard, against the challenge posed by the district court in this case, their historical right to have an Art. III judge personally preside over jury selection. Since their private interest far outweighs the government's minimal countervailing concerns, the assignment of jury selection violated their right to due process and they are entitled to a new trial.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

JOEL B. RUDIN*
Mass & Rudin
Attorneys for Petitioner Jose Gomez
45 Rockefeller Plaza, Suite 730
New York, New York 10111
(212) 969-9200

JERALD LEVINE
Attorney for Petitioner
Diego Chavez-Tesina
73-19 Broadway
Jackson Heights, New York 11372
(718) 507-6464

JOEL B. RUDIN
(Of Counsel and on the Brief)

**Counsel of Record*

APPENDIX

PETITIONERS' APPENDIX

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution provides, in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . .
>
> * * *
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

STATUTORY PROVISIONS

Title 18, United States Code, § 3401 provides, in pertinent part:

> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

Title 28, United States Code, Section 636 provides, in pertinent part:

§ 636. **Jurisdiction, powers, and temporary assignment**

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedures for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

Federal Rule of Criminal Procedure 1 states:

Rule 1. **Scope**

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Federal Rule of Criminal Procedure 24(a) states:

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Federal Rule of Criminal Procedure 54 provides, in pertinent part:

Rule 54. **Application and Exception**

(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States . . .

* * *

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

* * *

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York states:

Rule 1. **Jurisdiction—28 U.S.C. Section 636**

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.